Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

R. DALE STERRITT, JR.; RICHARD D. STERRITT, SR.; LARRY STERRITT; STERRITT PROPERTIES, INC.; and 20TH CENTURY HOLDINGS, INC.,

Petitioners,

v.

CONTINENTAL INVESTMENT CORPORATION, and STEWART RAHR, in his own right and in the right and on behalf of Continental Investment Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented in this case, in which judgment was rendered against the Petitioners and other defendants for $233,584,228.98, plus costs of court, based upon findings of securities fraud involving purchases of stock in a publicly-held company, are as follows:

1. In the absence of any promulgated standards for District Courts to follow in determining trial time allocation in timed trials, were Petitioners denied Due Process of Law by the District Court's imposition of arbitrary time allocations and limitations in the presentation of evidence and argument, which were inconsistently and arbitrarily applied, including:

   the initial ruling that the central defendant in an alleged conspiracy could not participate in the trial, denial of his motion for reconsideration, and then reversal of such ruling without warning at the beginning of trial;

   allowance of too little trial time to defendants as a whole to defend themselves in a two week trial, with a complaint 90 pages in length, containing 20 counts and 265 numbered paragraphs, with over 1000 Plaintiffs' exhibits, and allocation of trial time on a *per capita* basis among the defendants in a conspiracy trial, without weighting the time according to which were the primary defendants, which resulted in allowing only 107 minutes for Petitioner Dale Sterritt, the primary defendant; and

changing the time allocation rules on several occasions, including denial of adequate time for closing argument, giving Petitioners only 20 minutes to respond to 70 minutes of the Plaintiffs' argument, with a 77 page jury charge, and over 1000 trial exhibits, not even allowing Petitioners to utilize the portions of their meager time allotments which they had conserved in reliance upon the District Court's initial ground rules?

2. In an action under the antifraud provisions of the Federal Securities Laws, should a plaintiff be allowed to recover damages for purchases of securities in reliance upon material nonpublic misrepresentations, which contradict the disclaimers and cautionary disclosures in the public filings of the issuer concerning the identical material issues, thereby essentially rewarding him for insider trading?

STATEMENT PURSUANT TO RULE 29.6

Both Sterritt Properties, Inc., and 20th Century Holdings, Inc., are 100% owned by Sara Family, Ltd. There is no parent corporation for Sara Family, Ltd., and no publicly held company owns 10% or more of the stock of Sara Family, Ltd.

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Petitioners R. Dale Sterritt, Jr. ("Dale Sterritt"), and Richard D. Sterritt, Sr., Larry Sterritt, Sterritt Properties, Inc. and 20th Century Holdings, Inc. ("the RDSSR group"), hereby file this their Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and state the following:

CITATIONS TO REPORTS OF OPINIONS TO BE REVIEWED

The decisions of the Court of Appeals, and of the District Court, herein are unreported and are reproduced in Appendix A and B, respectively

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered June 7, 2002, and the Motions for Rehearing of Petitioners were denied July 8, 2002. (App. C). This Court has jurisdiction of this Petition for Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED IN THE CASE

Constitution of the United States, Amendment V

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Securities Exchange Act of 1934

> 15 U.S.C. Sec. 78t-1. Liability to contemporaneous traders for insider trading
>
> (a) Private rights of action based on contemporaneous trading
>
> Any person who violates any provision of this chapter or the rules or regulations thereunder by

purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

* * *

(c) Joint and several liability for communicating

Any person who violates any provision of this chapter or the rules or regulations thereunder by communicating material, nonpublic information shall be jointly and severally liable under subsection (a) of this section with, and to the same extent as, any person or persons liable under subsection (a) of this section to whom the communication was directed.

. . . .

15 U.S.C. Sec. 78u-1. Civil penalties for insider trading

(a) Authority to impose civil penalties

(1) Judicial actions by Commission authorized

Whenever it shall appear to the Commission that any person has violated any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security or security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) while in possession of material, nonpublic information in, or has violated any such provision by communicating such

> information in connection with, a transaction on or through the facilities of a national securities exchange or from or through a broker or dealer, and which is not part of a public offering by an issuer of securities other than standardized options or security futures products, the Commission —
>
> > (A) may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by the person who committed such violation; and
> >
> > (B) may, subject to subsection (b)(1) of this section, bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by a person who, at the time of the violation, directly or indirectly controlled the person who committed such violation.
>
> . . . .

STATEMENT OF THE CASE

Course of Proceedings and Disposition in Lower Court

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The Court of Appeals had jurisdiction of an appeal from a final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF FACTS

Parties

Continental Investment Corporation ("Continental") is a company involved in the waste disposal business. (Plaintiffs'

Exhibit, hereafter "PX" 17). Continental's stock was publicly traded but not listed on any exchange or with NASDAQ.

Dale Sterritt was President and Chief Executive Officer of Continental, with Sterritt Properties, Inc., the largest shareholder of Continental. (PX-42). Much of the assets of the extended Sterritt family were invested in Continental stock. (Second Supplemental Record, hereafter "S.R.2", Vol. 8 at 727-728, Vol. 9 at 978).

Stewart Rahr ("Rahr") is a wealthy, self-made man who dropped out of law school to take over a struggling family business which wholesaled pharmaceuticals and medical supplies in the New York City area, and built it up into a multimillion dollar company, with annual sales over $1.5 billion. (S.R.2, Vol. 8 at 681-683).

Rahr purchases of Continental Stock in reliance upon Nonpublic Information

Beginning on October 13, 1995, Rahr began purchasing shares of stock in Continental, (RR Vol. 5, p. 786:2-6; PX 81.) based upon nonpublic representations by Dale Sterritt to Rahr and his son that Continental would be listed on NASDAQ and a quarry that it owned would be turned into a landfill. (RR Vol. 5, pp. 692:12-16; pp.792:21-23.) Rahr testified repeatedly that these were the key representations upon which he relied. (S.R.2, Vol. 8 at 692-694, 695, 699, 749-756; PX-69).

The documents that Rahr reviewed prior to investing in Continental were the 1994 10-K and the Rinfret Report. (S.R.2, Vol. 8 at 698; PX-69). Peter Rinfret, an attorney for whom Rahr's son worked, had analyzed Continental for investment on Rahr's behalf. (S.R.2, Vol. 8 at 698; PX-69). Rahr's son had helped in writing the report. (S.R.2, Vol. 8 at 754). The Rinfret report warned of obstacles to permitting, and that political opposition

might prevent success in obtaining the permit. (S.R.2, Vol. 8 at 754-758).[1] Another analysis also warned of the same risks.[2]

The risks and uncertainties of using the site for waste disposal were extensively discussed in the public filings of Continental. The June 30, 1994, 10-Q (PX-6) disclosed that public opposition and compliance with regulatory requirements would impact final approval and installation. The 1994 Form 10-K (PX-8) disclosed (1) the likelihood of political opposition to permitting, (2) stringent environmental regulations (pp.2-4), (3) provided a detailed discussion of business risks including extensive regulatory and financial requirements, and the likely delays from political opposition (pp 6-11), and (4) included an accountant's letter expressing doubt that the company would be a going concern (p.F-1 and Note C).

The 1995 Form 10-KSB (PX-7) disclosed: (1) the need to obtain Special Use permits, the approval of which was not certain (p.4), (2) discussed the same business risks as in the 1994 Form 10-K (pp.6-13), (3) disclosed that the working capital deficit of the company had increased substantially from the prior year, and that without additional funds, it would be necessary to delay development of the site due to the lengthy and costly approval process (p. 16), and (4) also included an accountant's letter with a "going concern" reservation. (p. F-1 and Note C). These cautionary disclosures continued through the 1996 and 1997 public filings of Continental. (PX-728, PX-821).

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1. The report warns that other landfills had closed due to stringent regulations, and that a $1.5 million bridge loan was needed to facilitate approval of the NASDAQ application.

2. The report of Hempstead & Co., assessing the fair market value of Continental as of May 27, 1997. (PX-69), discussed environmental regulations, and the risks entailed, in great detail, (*Id.* at 10-12, 44), and observed that Continental would incur substantial costs in developing the proposed landfill which could not be estimated with certainty. (*Id.* at 12).

Procedural History of the Lawsuit

The underlying suit was originally filed in the United States District Court for the Eastern District of New York (AR Vol. 21, p. 6), later amended to join the RDSSR group, along with 80 other defendants, (AR Vol. 21, p. 28), then removed to Bankruptcy Court in the Northern District of Texas (*See* AR Vol. 1, p. 1), and the reference withdrawn. (AR Vol. 1, p. 42, p. 69).

REASONS FOR GRANTING THE PETITION

I. PETITIONERS WERE DENIED A FAIR TRIAL BY THE ARBITRARY TIME LIMITATIONS IMPOSED BY THE TRIAL COURT AND THE COURT'S REFUSAL TO FOLLOW ITS OWN RULES

A. The trial court imposed arbitrary time limitations which made a fair trial impossible in this complex case

1. The time allotted for discovery was unfairly limited

Plaintiff Stewart Rahr filed his Third Amended Complaint on September 7, 1999, (AR Vol. 15), and his Complaint in Intervention on behalf of Continental on September 8, 1999. (AR Vol. 7, p. 1597). Petitioners filed Motions to Dismiss the Third Amended Complaint. (S.R. Vol.8, p.1941, Vol. 11, p. 2569, 2587). Since the claims involved claims under the Federal Securities Laws, pursuant to 15 U.S.C. §77z-1(b)(1) and 15 U.S.C. §78u-4(b)(3)(B), discovery was stayed pending ruling on the motions to dismiss.

On February 17, 2000, the District Court denied the Motion to Dismiss and Motion to Abate. (*See* AR Vol. 11, pp. 2670-72). On March 15, 2000, the District Court entered its Scheduling Order, which provided that (1) discovery must be completed by April 30, 2000 (45 days from entry of the

Scheduling Order), and (2) the final pretrial conference would be held on June 2, 2000 (79 days from entry of the Scheduling Order). (AR Vol. 12, p. 2802). The motion to reconsider the Scheduling Order was denied. (AR Vol. 13, p. 3042, p. 3105).

Rahr spared no expense in prosecuting his juggernaut attack against Petitioners, spending in excess of $8 million in attorneys' fees and expenses. (S.R.2,Vol. 8 at 676, 741-745). As a result, Petitioners were denied a fair opportunity to develop their defenses for trial.

Rule 26, FED. R. CIV. PROC. permits a district judge to dictate the terms and conditions upon which discovery may be had. *Transamerica Computer v. International Business Machines Corp.*, 573 F.2d 646, 652-53 (9th Cir. 1978). The power to set discovery deadlines in "exceptional" cases is not unlimited, "for the parties must be given a fair and adequate opportunity to develop their cases." *Id.*; *citing*, *Freehill v. Lewis*, 355 F.2d 46, 48 (4th Cir. 1965); *see also In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993).

In this case, the 45 days allowed by the District Court for discovery was an even shorter period of time than in *Freehill*. Further, the Petitioners were also at a disadvantage because of Respondents' superior financial resources and the discovery Respondents had obtained in other cases which was unavailable to Petitioners.

2. The time allocations and rulings denying trial participation at the pretrial conference were arbitrary and unreasonable

At the pretrial conference on June 2, 2000, the District Court allocated ten days for the jury trial, which based on an estimate of five-and-a-half hours per normal trial day, totaled approximately fifty-five hours for trial. (June 2, 2000 Reporter's Record "6/2 RR", p. 5:4-15). The District Court, "not having any better way to do this", allocated half of the time to the two Plaintiffs and the other half to "the defendants who

have participated in the preparation of the pretrial order." (6/2 RR p. 5:15-18). Under the circumstances, three groups of Defendants participated in the preparation of the pretrial order, of which the the RDSSR group was one. (6/2 RR p. 4:9-22). The District Court ruled that the remaining parties would not be permitted to present evidence or to question witnesses. (6/2 RR pp.4:23-5:2).

This time allocation by the trial court totally ignored the timely-filed exhibit list and witness list filed by Dale Sterritt, which indicated that he sought to introduce **251 trial exhibits** and to present **68 witnesses for total time of 206.5 hours!** The RDSSR group objected to the allocation of time, because of the complexity of the issues, and requested at least a sixty-five percent allocation of time to all Defendants, which was denied. (6/2 RR pp. 15:21-16:2; *See also* pp. 19:9-20:10). This arbitrary time allocation ignored the warning in the Advisory Committee Notes to the 1993 Amendments to Rule 16, FED. R. CIV. PROC. that although the rule authorizes a trial judge to limit the length of trial, "[a]ny such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination."

The District Court absolutely refused to hear any explanation from Dale Sterritt at the pretrial conference when he was banned from participating at trial, and summarily denied his motion for reconsideration which explained the reasons for not signing the pretrial order or inclusion of his suggested portions. (Rec. 3772, 3040). Therefore, from June 2, up until the very beginning of trial, Dale Sterritt was of the belief that he would be allowed no participation at trial.

The sanction visited upon Dale Sterritt was too severe under the circumstances. As the Fifth Circuit held in *United States v. Garrett*, 238 F.3d 293, 298, 300-301 (5th Cir. 2000) (Fish, Dist.

Judge, sitting by designation, concurring), in fashioning a sanction for discovery violations, a district court should impose only that sanction which is the least severe way to effect compliance with the court's discovery orders, finding that it was an abuse of discretion to exclude 25 Government witnesses where the violation could have been cured with a brief continuance. Here, Dale Sterritt had demonstrated a reasonable explanation for his non-signature to the pretrial order (*see*, Rec. 3772), and any violation could have been cured with a brief continuance.[3]

B. The last-minute reconsideration by the District Court at the beginning of trial materially changed the time allocation in an arbitrary and unfair manner

1. The District Court suddenly changed the rules at the very beginning of trial, and re-allocated the time for Defendants

On June 12, 2000, immediately before jury selection, in the first of several alterations of the rules for time allocation, the District Court reconsidered its decision to exclude the Defendants who had not participated in the preparation of the pretrial order, stating that they would be permitted to participate and receive their proportionate amount of time. (RR Vol. 1, p. 7:18-8:17). Based upon 14 Defendants "participating" in trial the District Court calculated that this would mean that each Defendant was entitled to 107 minutes **for argument and presentation of evidence**. (S.R.2, Vol. 4 at 8-9). (Emphasis added).

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3. The decided cases supporting imposition of such drastic sanctions involved instances of non-compliance totally different than those present here. In each case, there were multiple failures to file pre-trial orders, and the district court had also levied lesser sanctions first, before dismissal. *Price v. McGlathery*, 792 F.2d 472, 473-74 (5th Cir. 1986); *Callip v. Harris Co. Child Welfare Dept.*, 757 F. 2d 1513, 1519 n.7, 1520-1521 (5th Cir. 1985).

The RDSSR Petitioners renewed their objection to the allocation of time based upon the inability to "have a fair opportunity to present their defenses", and the District Court responded "I understand your position." (RR Vol 1, p. 19:1-7).

2. *Per capita* allocation of time among Defendants in a conspiracy trial was manifestly prejudicial and unfair to Dale Sterritt, the central Defendant.

Dale Sterritt was first advised, literally at the beginning of trial, that he would be allowed to participate, (S.R. 2, Vol. 4, at 4-10), *but with absolutely no advance notice and no opportunity to prepare to present defenses!* This last-minute allocation of 107 minutes did not allow him a reasonable time to prepare and defend himself in a case in which the plaintiffs were seeking tens of millions of dollars in damages, giving him less than 30 seconds per numbered paragraph of the complaint, and less than 5 minutes per separate count, and only ***six seconds per exhibit*** for Respondents' 1039 trial exhibits.

The indefensibility of the time allocation is underscored by the following key factors:

1. There were 14 defendants, with 6 separate counsel representing several groups, and one pro se defendant.

2. The Plaintiffs' Exhibits numbered 1039. (Rec. 3439).

3. There were 18 witnesses who actually testified at trial, which would mean that Dale Sterritt would have had an average of less than 6 minutes per witness had he devoted his entire time only to witness examination.

4. Dale Sterritt had timely filed his exhibit list seeking to offer 251 trial exhibits. (Rec. 3579), and his witness list seeking to present 68 witnesses, for total estimated time of 206.5 hours. (Rec. 3590).

5. The Third Amended Complaint was 90 pages in length, with 265 numbered paragraphs, and 20 separate counts on which recovery was sought. (Rec. at Vol. 15).

6. The plaintiffs had an exceptionally-well-funded team of attorneys, with over $8 million in legal fees and expert and investigator fees, and state of the art graphics equipment, while virtually the entire assets of most of the defendants were frozen by pretrial orders of the trial court.

3. The reallocated time was absolutely inadequate for Petitioners to defend themselves.

During the trial, the District Court periodically announced the time used by the parties. *See, e.g.*, RR Vol. 2, p. 215:4-14 (the RDSSR group used a total of 93 minutes); RR Vol. 3, p. 442:5-19 (the RDSSR group used a total of 165 minutes); RR Vol. 4, pp. 199:2-200:12 (the RDSSR group used a total of 224 minutes); RR Vol. 5, p. 856:10-857:3 (the RDSSR group used a total of 304 minutes); RR Vol. 6, pp. 1110:25-1111:12 (the RDSSR group used a total of 332 minutes); RR Vol. 7, pp. 1321:20-1322:14 (the RDSSR group used a total of 432 minutes). On the eighth day of trial, the District Court again reminded counsel for the RDSSR group that the time allocated to the RDSSR group "includes any time you want to use for closing argument." RR Vol. 8, p 1432:8. Likewise, the District Court continually reminded counsel for Petitioner Dale Sterritt

of his usage of the limited allotment of time. (*See, e.g.*, S.R.2, Vol. 8, at 856)[4]

The Fifth Amendment to the United States Constitution guarantees that no person shall be deprived of property without due process of law. There can be no question that Petitioners were denied due process of law by the arbitrary time allocation decreed by the trial court, placing the court's own personal travel schedule ahead of the interests of justice and fair play, and ignoring timely-filed documents in order to hasten a pre-ordained rush to judgment.

This case bears striking similarity to the abuses of discretion presented in *Sims v. ANR Freight System, Inc.*, 77 F.3d 846 (5th Cir. 1996). In *Sims*, even though the trial court had imposed strict time limitations upon the parties, the Court affirmed, but warned that:

> **[I]f the goal of expediency is given higher priority than the pursuit of justice, then the bench and the bar both will have failed in their duty to uphold the Constitution and the underlying principles upon which our profession is founded.** Speed is necessary, and the limited capabilities of the judicial system certainly should be considered in determining whether to impose limits on the introduction of evidence and the length of trial.

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4. At one point the District Judge stated:

> **I never make any effort to tell counsel how they should use their time, but I simply note without comment that we are approximately a little less than a third of the way through the trial, and Mr. Dale Sterritt has used almost half of his time. So he may be on short rations from here on unless he can get some of the other defendants to yield time to him.**

S.R.2, Vol.6, at 424 (Emphasis added).

> However, such considerations must be addressed with a cautious respect for the requirements necessary to achieve a fair trial.
>
> * * *
>
> **A trial is a proceeding designed to be a search for the truth.** *See Nix v. Whiteside*, 475 U.S. 157, 158, 106 S.Ct. 988, 989-990, 89 L.Ed.2d 123 (1986). The rules that have evolved over time that govern how trials are conducted in our society were conceived to aid the participants in performing their role in this search for the truth. Essential to the endeavor is an opportunity for the parties through their lawyers to present information in a manner that is comprehensible to a judge or jury. In this respect, the role played by lawyers in a trial is paramount. **When the manner of the presentation of information to a jury is judicially restricted to the extent that the information becomes incomprehensible then the essence of the trial itself has been destroyed.**

77 F.3d at 849 (Emphasis added). Here, sadly, the trial court's own travel schedule, and not a search for truth, seems to have caused the severe time limitations imposed upon Petitoners. (*See* S.R.2, Vol. 11, at 1476-1485).

A district judge has broad discretion in managing his docket, including trial procedure and the conduct of trial, and may maintain the pace of the trial by setting time limits on counsel. *Sims v. ANR Freight System, Inc.*, 77 F.3d 846 (5th Cir. 1996) (citing *Ruiz v. Estelle*, 679 F.2d 1115, 1129, *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S. Ct 1438, 75 L. Ed. 2d 795 (1983)). However, such discretion may be abused when the judge's conduct strays from neutrality and a defendant is denied a fair trial. *Ruiz*, 679 F.2d at 1129.

The key question is whether Petitioners' counsel was permitted to advocate effectively for their clients and whether "the court's restrictions hamper the jury's ability to understand the information and issues at trial." *United States v. Gray*, 105 F.3d 956 (5th Cir. 1997). When the restrictions placed on the lawyers regarding the manner of the presentation adversely impact on the comprehensibility of the evidence to the point that a party is denied a trial, the case should be reversed. *Sims*, 77 F.3d at 849.

C. The increase of 80 minutes of allotted time to Dale Sterritt after the Plaintiffs rested was insufficient to cure the prejudice suffered

Following numerous objections by Petitioners, the District Court finally changed, for the second time, the rules for time allocation.[5] **After the Plaintiffs/Respondents rested their case**, the District Court announced that he was going to allow an additional 80 minutes for Dale Sterritt. This change of rules, midstream, was too little, too late, because, as all seasoned trial practitioners realize, cross-examination at the time of initial presentation of damaging evidence, is critical to effective presentation of a defendant's case.

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5. The trial judge had finally relented following numerous complaints by the defendants concerning the unfair allocation of time. *See* S.R.2, Vol.8 at 864-871. During this exchange, when one of the defense counsel expressed concern about Dale Sterritt, the primary defendant, nearly being out of time, the cavalier response of the trial court was:

> **And I warned him about it. I thought he spent a lot of time in cross examination which I thought was not needed.**

Id. at 867 (Emphasis added). The next trial day, ***after the plaintiffs had rested***, Dale Sterritt's counsel moved for more time, citing the prejudice to his client, S.R.2, Vol.9 at 945-949, and the court announced that the lunch break schedule would be altered to create an additional 80 minutes for him. *Id.* at 950.

D. Changing the previously-announced time allocation rules for closing argument was a further denial of due process

At the close of the evidence, the Petitioners expected to use their remaining time reserved by them for closing arguments, based upon numerous statements by the District Court that their time allocation was for both presentation of evidence and argument. Instead, the District Court announced that he would change the rules and allow the defendants only **10 minutes each**, and the Plaintiffs **70 minutes** to present closing argument. (RR Vol. 8, p. 1476:15-21, p. 1479:19-20, pp. 1479:21-1480:18). Petitioners objected. (RR Vol. 8, p. 1481:9-20). This re-allocation of time was apparently motivated by the District Court's desire to conclude the trial no later than Friday, June 23, 2000, because the District Judge was not going to be in town the following week. (*See* RR Vol. 8, p. 1483:13-14).[6]

The District Court's second revision of the time allotments arbitrarily limited the RDSSR group's time, and Dale Sterritt's

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6. All the defendants vigorously objected to the fact that the primary defendant, Dale Sterritt, would be limited to only 10 minutes to present closing argument, but the trial judge expressed far more concern about his personal travel plans than the interests of justice or due process:

> **I'm not going to be in town next week. So we have, as I see it, two choices. One is to have a Saturday session so that we could possibly obtain a verdict that day. The other is next week that I may have to have a magistrate judge of this court receive the jury's verdict. . . . Friday afternoon is the absolute deadline. I have to have this case to the jury by Friday afternoon. . . . My guess is unless it appears, say, by five o'clock that the jury is close to a verdict, we would probably recess around five, and whatever we do, we would go to the next day or next week. . . . So my inclination is not to work Saturday *since I'm leaving town and I have other things to do.***

S.R.2, Vol. 11, at 1483-1485 (Emphasis added).

time, to ten minutes each for closing argument,[7] to the Petitioners' prejudice because they had reasonably relied on the earlier rulings of the District Court.

This change of the rules was a denial of a fair trial, considering the number of parties and the complexity of Plaintiffs' claims. The jury charge was 77 pages long, and contained 24 questions, none of which adequately could be addressed in 17 minutes of closing argument. To illustrate the imbalance, the Record contains 41 pages of argument from Plaintiffs' counsel (RR Vol. 9, pp. 1496-1530 and 1573-1580), 9 pages of argument from counsel for the RDSSR group (RR Vol. 9, pp. 1563-1572), and only five pages for Dale Sterritt (S.R.2, Vol. 12 at 1530-1535).

Over a century ago, the Texas Supreme Court held that

> On the trial of this cause, after the evidence had been closed, the court of its own motion limited the counsel for plaintiff and defendants to ten minutes in which to present their cause to the jury. This was such an error as will require a reversal of the judgment. Parties litigant have a right to be heard, by themselves or counsel, and no person shall be deprived of any rights or privileges excepting by due course of law. We think the court in this case attempted to abridge one of the fundamental rights of every citizen, and which we have no right to overlook.
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> . . . . [P]arties have a right to a reasonable time for the presentation of the facts to the jury, as well as a reasonable time to comment on those facts, and to draw therefrom what they may consider the natural and legitimate deductions. What time would be

7. The RDSSR group had seventeen minutes for closing arguments because some of the other Defendants did not use their time. *See* RR Vol. 9, p. 1563:9-10.

> reasonable and proper must depend very much upon the nature of the case, and the facts to be presented, but we think it not subject to the arbitrary dictation of the court or judge.

Nesbitt v. Walters, 35 Tex. 576, 577 (1873). Notably, *Nesbitt* was a simple trespass to try title case, with few witnesses, and issues.

In *Dallas Railway & Terminal Co. v. Aultman*, 253 S.W.2d 900 (Tex. Civ. App. – Dallas 1952, *no writ*), for closing arguments, the trial court allocated 50 minutes to the plaintiff, 30 minutes to one defendant, and 20 minutes to the second defendant. The *Aultman* court stated that "we cannot say [the allocation of time] was harmless" and reversed the case for a new trial. *Id.*, 253 S.W.2d at 902 (citing *May v. Hahn*, 54 S.W. 416 (Tex. Civ. App. Dallas 1899, no writ); *Mitchell v. Robinson*, 162 S.W. 443 (Tex. Civ. App.– Galveston 1913); and *Cooper v. Robischung Bros.*, 155 S.W. 1050 (Tex. Civ. App.– Galveston 1913)).

In *Pirrung v. T. & N. O. Railroad Co.*, 350 S.W.2d 50, 51 (Tex. Civ. App. – Houston 1961, *no writ*), the court cautioned that "[t]he trial judge should be careful to allow counsel sufficient time to properly present his case and to discuss all issues submitted to the jury." Since the case involved a collision between a train and an automobile, and the court had allowed 30 minutes to the plaintiff, and 30 minutes each to two defendants, no abuse of discretion was found.

In *United States v. Gray*, 105 F.3d 956 (5th Cir. 1997), the Court of Appeals was confronted with an appeal from a mail fraud conviction where the trial court had limited each defendant to a three-minute opening statement, and a 13-minute closing statement, but had only allowed the prosecution five minutes for its opening and 15 minutes for closing argument. Noting that the only issue for the jury was whether or not the defendants had the requisite intent to defraud, and that the jurors were

presented with relatively clear testimony and simple documents, the Court of Appeals held that the time limitations did not constitute reversible error. *Id.* at 962-962.

Of course, here the record and the issues were much more complex, and there were voluminous stacks of exhibits dealing with complex transactions. Further, here, the plaintiffs had an equal amount of time to the **total** allotted to all of the defendants, whereas in *Gray*, the time for the government was approximately **equal to that of *each defendant*.**

Here, sadly, the trial court's own travel schedule, and the desire to control the time of the trial purely for arbitrary reasons, seems to have caused the severe time limitations imposed upon the defendants. Petitioners were confronted with 17 witnesses, 1041 pages of testimony presented by the plaintiffs' direct and cross examination, and 1039 trial exhibits, and given only 27 minutes in total for closing argument. This was a denial of due process, with complete disregard for the complexity of the case, and the severity of the damages sought against the Petitioners.[8]

One Texas court, confronted with a case in which there were 18 witnesses, and the testimony on several material issues was conflicting, held that limiting the plaintiff's counsel to 30 minutes for opening and closing, and stopping him at the expiration of 40 minutes was reversible error. *Cooper v. Robischung Bros.*, 155 S.W. 1050 (Tex. Civ. App. – Galveston 1913, *writ dism'd*).

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8. The holding in *Rosiello v. Sellman*, 354 F.2d 219, 220 (5th Cir. 1965), that a limitation of 30 minutes per side for a negligence case, was not error, can likewise be distinguished due to the relative simplicity of the case presented there. That case involved only $7,000 in damages, and apparently very few witnesses and extremely simple facts.

E. The arbitrary and unfair time allocation caused fatal prejudice to Petitioners' ability to defend themselves

The harm resulting from this arbitrary time allocation by the District Court is best illustrated by examining several key factual disputes.

The conclusory testimony of one of Respondents' "experts" concerning the alleged "control" of "the Sterritts" over some 132 corporations was central to Respondents' claims of alleged failures to disclose "related-party" transactions. The testimony was based upon similarities in such things as mailing addresses and registered agents,[9] which could have been vigorously challenged in cross examination, but only through the expenditure of more than Petitioners' total time allotment.

Similarly, when Respondents presented conclusory "expert" testimony characterizing the alleged undisclosed related-party transactions, the testimony of the "experts" expended very few pages,[10] and very few minutes, of trial time, yet the underlying documents were voluminous, the transactions extremely complex, and any meaningful response would have taken days.

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9. *See* testimony of Mary Little, at Second Supplemental Record, hereafter "S.R.2", pp.109-118, and PX-1004 for the amazing broad brush approach used to claim that "the Sterritts" "controlled" numerous entities, in which she expended a very few minutes to state that her staff had assembled a list of 132 corporations supposedly related in some vague fashion. For one of the defendants to have rebutted such conclusory testimony, to which a proper objection was raised (*see* p.109), it would have taken many hours. This is the necessary result of allowing an expert to testify in conclusory fashion, leaving it to the opposing party to challenge the conclusions in cross-examination. Since the defendants did not have ample time to cross-examine, this damaging testimony stood unrebutted.

10. *See*, S.R.2, Vol. 5, at 16-37 ("[T]hese transactions were . . . very complicated."); S.R.2, Vol.6, at 410-420.

These so-called "related party transactions," utilized to calculate the "damages" to Continental, were the following: (1) 30 acre transaction in Ellis County, Texas;[11] (2) 253 acre transaction in Ellis County, Texas;[12] (3) 20 acre transaction in Fulton County Georgia;[13] (4) 74 acre transaction in Fulton County, Georgia;[14] and (5) Fiber Seal acquisition.[15]

Further, allowance of more time would have permitted Petitioners to explain the total absence of any real damages to

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11. The documents evidencing this transaction consisted of the following trial exhibits: PX-208, 220,220, 221, 222, 224, 225, 226, 227, 228, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 250, 471, 615, 813, 814, 815, 816, 817, 818, 819, 820, 821, 821A, 822, 850, 852, 855, 931, 932.

12. The documents evidencing this transaction consisted of the following trial exhibits: PX-251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 692, 693, 694, 813, 814, 815, 816, 817, 818, 819, 820, 821, 821A, 822, 852, 951, 952, 953.

13. The documents evidencing this transaction consisted of the following trial exhibits: PX-140, 141, 143, 144, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 165, 166, 167, 170, 171, 172, 173, 174, 175, 176, 520, 523, 528, 531, 540, 615, 673, 692, 693, 694, 813, 814, 815, 816, 817, 818, 819, 820, 821, 821A, 822, 859, 861, 862.

14. The documents evidencing this transaction consisted of the following trial exhibits: PX-103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 130, 142, 561, 565, 615, 723, 724, 725, 726, 727, 728, 729, 749, 750, 758, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 821A, 822, 861, 862.

15. The documents evidencing this transaction consisted of the following trial exhibits: PX-280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 546, 547, 548, 561, 615, 801, 802, 802A, 803, 804, 805, 806, 806A, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 821A, 822, 858, 862, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012.

Continental. In all the so-called related party transactions, the principal consideration was Continental stock.[16] Continental could not, however, have been damaged thereby, because ***all of this stock was later cancelled and rendered worthless by the Continental bankruptcy court.*** (S.R. 2, Vol.9, at 1079-1082).

F. Petitioners preserved the time allocation complaint

Rule 103(a) of the Federal Rules of Evidence provides in part as follows:

> Once the court makes a definitive ruling on the record admitting or excluding evidence, **either at or before trial**, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(Emphasis Added).

Here, Dale Sterritt timely filed his witness list for trial and his exhibit list for trial, listing 68 witnesses for a total of 203.5 hours (Record at 3579), and listing 251 Exhibits (Record at 3590; S.R. at 15-16, 39-42). Dale Sterritt made objections before, during, and after trial to the time allocation imposed by the trial court. (*See* Rec. at 3579, 3590, 3772; 2nd S.R., Vol. 8, at 864-871; S. R.2, Vol. 9 at 945-949; S. R.2, Vol. 11 at 1477-1485; Rec. 1424). On numerous occasions throughout trial, Petitioners repeatedly objected to the time limitations. (*See, e.g.*, S.R.2, Vol. 8, at 864-871; Vol. 9 at 945-949; Vol. 11 at 1477-1485).

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16. (1) the 30 acres was sold for 221,198 shares of Continental stock (PX-226); (2) the entity owning the 253 acres was transferred for 45,000 shares of Continental stock (PX-252), (3) the 20 acres was sold for 375,000 shares of Continental stock and $300,000 cash (S.R.2, Vol. 6, pp. 419-420), (4) the 74 acres was sold for 933,393 shares of Continental stock, $250,000 cash, and a $350,000 note convertible to Continental stock (S.R.2, Vol. 6, pp. 410-412), and (5) Fiber Seal was sold for 5,750,000 shares of Continental stock and an $800,000 convertible note (PX-284).

The purpose of an offer of proof is to make a clear record so that the appellate court can determine whether or not there has been error in excluding evidence. *Frisone v. U.S.*, 270 F.2d 401, 403 (9th Cir. 1959). The requirement of an offer of proof is excused where the court is aware from out of court discussions of the general nature of the evidence to be offered. *Charter v. Chleborad*, 551 F.2d 246, 249 (8th Cir. 1977), *cert denied*, 434 U.S. 856. Indeed, an offer of proof is unnecessary where an entire class of evidence has been formally declared inadmissible in advance by the trial court. *Greatreaks v. U.S.*, 211 F.2d 674, 676 (9th Cir. 1954).

Finally, Petitioners moved for a new trial based upon the unfair time allocations. (Rec. 1424,Vol. 20, p. 4249). The objection was preserved.

G. The usage of "timed trials" and their impact upon fundamental Due Process rights is a matter that justifies review by this Court pursuant to Rule 10(c), SUP. CT. R.

Petitioners respectfully submit that this issue is so fundamental to Due Process, that the time limitations imposed here, and the treatment of them by the Court of Appeals, involves an important question of federal law that has not been, and should be, settled by this Court. Rule 10(c), SUP. CT. R.

Although Petitioners do not have reliable statistics concerning the current overall prevalence of "timed trials," whereby trial time is kept by stopwatch, with counsel held strictly accountable for overall time usage, whether in the form of presentation of direct testimony, reading of deposition testimony, cross-examination of hostile, argumentative witnesses, discussion of numerous, voluminous exhibits, and presentation of opening, interim, and closing arguments, it is believed that the practice is already being used in a substantial number of courts. Further, the demands caused by the increasing backlog of cases in the Federal system, as well as the impetus of the

Civil Justice Reform Act, 28 U.S.C. §§ 471-482,[17] are likely to encourage more trial courts to utilize this dangerous approach.[18] According to *The Civil Justice Reform Act Expense and Delay Reduction Plans: A Sourcebook*, published by the Federal Judicial Center, and written by David Rauma & Donna Stienstra (1995), there were already in 1995 seven Federal Districts reporting specifically various means for limitation of time at trial under "Methods for Trial Management," although most courts had not yet adopted any plan for trial management. *See generally Table 8*, pp. 212, 219, 222, and 224. Counsel are aware, for example, of two District Judges each in the Northern District of Texas, Fort Worth Division, and Dallas Division, who follow such practice in all civil trials, and have been advised at seminars and in discussions with other counsel that the practice is commonplace.

Petitioners must advise the Court that they cannot establish that there is any conflict among the Circuits on this point, simply because the few times that the matter has been addressed in opinions from the Courts of Appeals, the Courts have merely described it as something left to the "discretion" of the trial judge. Thus, the Courts of Appeals have abdicated responsibility by failing to provide any guidelines to the District Courts. As a result, this most critical and fundamental aspect of the very core of Due Process – a fundamentally fair trial – is being left to the unguided discretion of the District Courts, with effectively no meaningful review of their sometimes arbitrary actions.

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17. This much was predicted by Judge Robert E. Keeton in his speech, "Times are Changing for Trials in Court," 21 Fla.St.U.L.Rev. 1, 18-19 (1993); *See generally*, Long Range Planning: A Reality in the Judicial Branch, 44 Am.U.L.Rev. 1599, 1613-1615 (1995).

18. It is not only the Petitioners herein who believe that iron-handed limitation of time within which to present one's case creates Due Process problems. *See*, The Hourglass and Due Process: The Propriety of Time Limits onCivil Trials, 26 U.S.F.L.Rev. 237, 250-259 (1992); Pragmatism Applied: Imagining a Solution to the Problem of Court Congestion, 22 Hofstra L.Rev. 567, 597-599 (1994).

Accordingly, this issue is another type of issue "capable of repetition, yet avoiding review," *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911), because if the Courts of Appeal merely defer to the "discretion" of the trial courts, arbitrary and uneven treatment at the hands of hostile trial judges will be a wrong without a remedy.

Here, the arbitrary and unfair allocation of time was not done with any studied or careful analysis, but rather more as a punitive sanction. There was no attempt by the trial court, for example, to follow the detailed and helpful guidelines found in the *Civil Litigation Management Manual*, published by the Judicial Conference of the United States, Committee on Court Administration and Case Management (2001)[19], which lists numerous factors to consider (*see*, *e.g.*, pp. 84-87), and recommends:

> Setting time limits requires careful consideration of the views of counsel (who know the case), of the allocation of burdens among the parties, and of how the respective cases will be presented (e.g., one side may depend on cross-examination of the opponent's witnesses to present much of its case). Naturally, this should be done in full consultation with counsel.

Id. at p. 85. While this statement is not claimed to be authoritative, it is, nevertheless, good judicial common sense, which admonishes the trial judge to keep the rights of the litigants at the forefront, a consideration which was ignored in this case.

Petitioners respectfully request that the judgment below be reversed, due to their denials of Due Process arising from the unfair and arbitrary application of time limitations, and that, in so doing, this Honorable Court provide some guidance to the

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19. The publication states that it is for the guidance of judges, and is not intended to be relied upon as authority, and creates no rights or duties.

Courts of Appeals and District Courts in providing time limits at trial, similar to the guidelines suggested in the *Civil Litigation Management Manual*, admonishing the lower courts, however, to keep the rights of the litigants at the forefront to avoid the type of treatment that occurred here.

II. RESPONDENTS COULD NOT LAWFULLY RECOVER DAMAGES FOR SECURITIES FRAUD BASED UPON ALLEGED MISREPRESENTATIONS WHICH CONTRADICTED CAUTIONARY STATEMENTS IN THE PUBLIC FILINGS OF CONTINENTAL

A. The key alleged misrepresentations relied upon were the subject of express cautionary statements in the publicly-filed disclosures of Continental

Rahr testified repeatedly that the two key representations upon which he relied were: (1) that the Ben Hill site, sometimes known as "the hole" would be permitted for use as a landfill, and (2) that Continental's stock would be listed on NASDAQ. (S.R.2, Vol. 8 at 692-694, 695, 699, 749-756; PX-69).

The risks and uncertainties regarding the ability of Continental to use the Ben Hill site for waste disposal were extensively discussed in the public filings of Continental, as summarized in the Statement of Facts above. These disclosures made it clear that the permitting process was highly uncertain, that environmental regulation made permitting more expensive, sometimes prohibitively so, and even included a qualification by the accountants expressing doubts that the company would even be a going concern.

Rahr's complaint makes it clear that in fact he was primarily relying upon alleged nonpublic representations made privately to him or to his son or advisers by Dale Sterritt. Rahr alleges certain matters, which constitute judicial admissions[20], admitting

20. *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 195 (5th Cir. 1988).

his reliance upon nonpublic inside information in purchasing Continental stock (*see*, Complaint at 12-13, 14 ¶48, 16-18, 21-23, 31-33, 46-47, 48, for the alleged non-public misrepresentations, and Complaint at 15 ¶50, 17 ¶56, 23 ¶75, 24 ¶76, 33 ¶100, 47 ¶133, 48 ¶135, 74 ¶200, 75 ¶208, for the statements of reliance thereon). Therefore, based upon his own allegations, Rahr has admitted that the essence of his damages is based upon reliance upon inside information which he himself characterizes as material in purchasing Continental stock.

Since the key representations upon which Rahr allegedly relied were the subject of detailed public disclosures, with express cautionary disclaimers and warnings, it was apparent that Respondents sought to demonstrate entitlement to recover under the antifraud rules of the Securities Laws based upon **private, non-public misrepresentations allegedly made by Dale Sterritt which contradicted the public cautionary statements**.

As a general rule, courts in Texas will not lend their aid to enforcement of illegal contracts, but will leave the parties where the court found them. *Mercury Life & Health Co. v. Hughes*, 271 S.W.2d 842, 846 (Tex. Civ. App. – San Antonio 1954, *writ ref'd.*); *Lulirama Ltd. v. Axcess Broadcast Services*, 128 F.3d 872, 880 (5th Cir. 1997); *McFarland v. Haby*, 589 S.W.2d 521 (Tex.Civ.App.-Austin 1979, *writ ref'd., n.r.e.*); *Dominguez v. Trent*, 836 S.W.2d 677, 679 (Tex. App. – El Paso 1992, *no writ*); *Ben E. Keith Co. v. Lisle Todd Leasing, Inc.*, 734 S.W.2d 725, 727 (Tex. App.– Dallas 1987, *writ ref'd., n.r.e.*); *Plumlee v. Paddock*, 832 S.W.2d 757, 759 (Tex. App. – Fort Worth 1992, *writ denied*).

Under the 1934 Act, it is illegal for a person to purchase or sell a registered security for which public disclosures are required if the person is in possession of **"material, nonpublic information"**. 15 U.S.C. § 78u-1(a) (imposing liability in an action by the Securities and Exchange Commission), 15 U.S.C.

§ 78t-1(a) (creating a private right of action for contemporaneous purchasers or sellers against the person who sold or purchased while in possession of material, nonpublic information).

By his own pleadings, Rahr was acting as a "tippee" who had received material nonpublic information. A "tippee", who receives material nonpublic information from a company insider, assumes a fiduciary duty not to trade upon that information. *United States v. Ruggiero*, 56 F.3d 647, 655 (5th Cir. 1995), *cert. denied*, 516 U.S. 951, 979; *United States v. Bryan*, 58 F.3d 933, 953 (4th Cir. 1995); *SEC v. Stephenson*, 720 F. Supp. 370 (S.D.N.Y. 1989); *SEC v. Hurton*, 739 F. Supp. 704 (D. Mass. 1990).

It is well established that if the plaintiff is *in pari delicto*, his own illegal conduct will bar his recovery for securities fraud. *Pinter v. Dahl*, 486 U.S. 622, 632-641 (1988); *Bateman Eichler v. Berner*, 472 U.S. 299, 306-309 (1985). The record established conclusively that Rahr purchased Continental in reliance upon alleged untrue inside, nonpublic information.

B. Appropriate disclaimers of uncertainty, included in public filings, rendered reliance upon the key alleged representations unreasonable as a matter of law

The Fifth Circuit Court of Appeals has emphasized the difficulty of predicating securities fraud liability based upon predictions of future events. In *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 203ff. (5th Cir. 1988), the Court of Appeals concluded that this determination must be made on a case-by-case basis. *Id.* at 204-206; *accord*, *Rubinstein v. Collins*, 20 F.3d 160, 167-168 (5th Cir. 1994); *Mercury Air Group v. Mansour*, 237 F.3d 542, 547 (5th Cir. 2001). The *Isquith* court further noted that adequacy of disclosure can only be judged against an objective standard of investor behavior. *Id.* at 207-208; *accord*, *Mercury Air Group v. Mansour*, 237 F.3d 542, 547 (5th Cir. 2001).

In adopting the "safe harbor" rules for forward-looking statements, the Securities Exchange Commission allowed companies to make certain "forward-looking statements" in their public filings without incurring liability under the antifraud rules. Safe Harbor Rules for Projections, Securities Act Release No. 6084 [1979 Transfer Binder] Fed. Sec.L.Rep. (CCH) ¶ 82,117 (July 5, 1979) (adopting Exchange Act Rule 3b-6, 17 C.F.R. § 240.3b-6 (1987) and Securities Act Rule 175, 17 C.F.R. § 230.175 (1987), cited in *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 204 n.12 (5th Cir. 1988). The categories of such "forward-looking statements" which were thus insulated included statements of management's plans and objectives for future operations, and statements of future economic performance.

Although Rahr claims that Dale Sterritt misled him into believing that the two key alleged representations would occur, he further disclaims having spent much time reading or relying upon the public disclosures of these two predicted events, or the cautionary disclaimers made concerning them, in the Continental public filings. These statements by Rahr indicate a complete lack of the due diligence required of investors who assert a claim under Rule 10b-5 under Fifth Circuit law. *Mercury Air Group v. Mansour*, 237 F.3d 542, 547 (5th Cir. 2001).

As the *Isquith* court made clear, the adequacy of disclosures concerning future events is to be measured against an **objective** standard of investor behavior, looking at the information disclosed in the public filings concerning such matters as a whole. 847 F.2d at 207-208. More recently, the Fifth Circuit, in *Rubinstein v. Collins*, 20 F.3d 160 (5th Cir. 1994), explained that the "bespeaks caution" doctrine " has developed to address situations in which optimistic projections are coupled with cautionary language" and held that the applicable test is whether a reasonable investor would consider the prediction significant in light of the entire mix of information. 20 F.3d at 167-168; *citing, Krim v. BancTexas Group*, 989 F.2d 1435, 1445 (5th Cir.

1993); *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 207-208 (5th Cir. 1988).

Here, given the public disclosures made by Continental regarding the risks, uncertainties, and expenses inherent, it is clear that reliance by an objective reasonable investor would have been unreasonable. *Mercury Air Group v. Mansour*, 237 F.3d 542, 547 (5th Cir. 2001).

C. Denial of recovery for security fraud to persons who have relied upon nonpublic misrepresentations contradicting public disclosures is of critical importance to the securities markets

Petitioners respectfully submit that this issue involves an important question of federal law that has not been directly settled, and should be, settled by this Court. Rule 10(c), SUP.CT.R. Although this Court has recognized the applicability of the *in pari delicto* defense, *Pinter v. Dahl*, 486 U.S. 622, 632-641 (1988), *Bateman Eichler v. Berner*, 472 U.S. 299, 306-309 (1985), the principle urged herein is a direct and necessary corollary to the doctrine, one essential to maintaining the integrity of the securities markets. If a party relying upon material inside information directly contradictory to cautionary public disclosures is allowed to recover the largest judgment in the history of the Northern District of Texas as his compensation for such illegal conduct, the courts will make a mockery of the antifraud provisions of the securities laws.

CONCLUSION

For the reasons stated above, Petitioners respectfully pray that this Honorable Court issue its Writ of Certiorari to the Court of Appeals for the Fifth Circuit, and, upon review, reverse the judgment of the District Court, render judgment that Respondents take nothing for their claims under the Federal Securities laws, and remand this case, with costs taxed against Respondents.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JUNE 7, 2002

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-10947

STEWART RAHR, in his own right and in the right and on behalf of Continental Investment,

Plaintiff-Appellee,

VERSUS

RESCUE CAPITAL CORPORATION, ET AL.,

Defendants,

MALCOLM M. KELSO, R. DALE STERRITT, JR., EDWARD W. ROUSH, JR., FRED ROYER, RICHARD D. STERRITT, SR., LARRY STERRITT, STERRITT PROPERTIES, INC., and 20TH CENTURY HOLDINGS, INC.,

Defendants-Appellants,

VERSUS

CONTINENTAL INVESTMENT CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas

(3:99-CV-628-G)

Appendix A

Before DUHÉ, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIUM:*

I. PROCEDURAL HISTORY

This case involves a convoluted mix of facts and parties. There is one plaintiff, Stewart Rahr (suing on his own behalf and on behalf of Continental Investment Corporation), and five groups of appealing defendants: (1) Dale Sterritt; (2) the "Sterritt Group" (consisting of Dick Sterritt, Larry Sterritt, Sterritt Properties, Inc. and 20th Century Holdings, Inc.); (3) Edward W. Roush; (4) Fred Royer; and (5) Malcolm Kelso.[1]

Rahr initially sued the defendants on October 9, 1998, in the Eastern District of New York. He alleged that various defendants were engaged in a massive fraudulent enterprise related to Continental Investment Corporation (CIC). He sought to recoup the approximately $12 million that he invested in CIC and lost as a result of the defendants' fraudulent activities.

The suit was then moved by the defendants to a bankruptcy court in Texas. On May 18, 1999, it was transferred to the Northern District of Texas. CIC then intervened to assert claims against the defendants. When the case was finally tried in the Northern District of Texas, the jury returned a unanimous verdict

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1. On March 19, 2001, this Court dismissed Kelso's appeal pursuant to the fugitive disentitlement doctrine. On September 17, 2000, we reconsidered that decision and reinstated his appeal.

for the plaintiffs against some of the defendants, and the District Court accordingly entered judgment in their favor. Some of those defendants now appeal here. Finding no error, we AFFIRM the District Court's judgment.

II. THE FACTS

CIC is a waste disposal company, which has been liquidated in bankruptcy since the onset of this litigation. Dale Sterritt was CIC's President and CEO. Before 1998, Sterritt Properties, Inc. was CIC's largest shareholder.

Rahr met Dale Sterritt in 1995. Based on Dale's representations about CIC, Rahr began investing in the company and continued to purchase stock in CIC through 1998. In total, he invested about $11.6 million, becoming CIC's largest investor. He also made loans totaling $450,000 to Dale and a Sterritt-family-owned company. Ultimately, his entire investment was lost, and the loans were never repaid.

At trial, the specifics of the various business ventures and dealings at issue were discussed in great detail. In brief, according to the plaintiffs' allegations, the defendants induced investors to buy millions of dollars of CIC stock by "representing that CIC's immense quarry excavation in Atlanta was ideally suited for use as a municipal landfill, and by promising that CIC was about to be listed on the NASDAQ." Then, "[o]nce the investment dollars started pouring in, the Sterritts, Roush, and Royer used [several] related corporations to siphon the money into their own pockets, and used various illegal stock sales to raise even more cash for themselves." According to Rahr, the defendants accomplished their fraudulent scheme in part by using companies that, while held out as unrelated to the Sterritts, were secretly owned and controlled by them.

Appendix A

III. ISSUES RAISED

Five groups of defendants filed briefs here. Each defendant raised several issues, and some issues were raised by more than one defendant. In summary, the defendants challenge: (1) whether the District Court abused its discretion by imposing sanctions against the defendants who did not participate in the pre-trial order; (2) whether the District Court abused its discretion by placing time limitations on the parties during trial; (3) whether the defendants are entitled to a new trial because the jury foreperson allegedly engaged in misconduct; (4) whether the plaintiff, Stewart Rahr, had standing to bring claims on CIC's behalf; (5) whether the District Court lacked jurisdiction to submit certain questions to the jury; and (6) whether the District Court erred by issuing an All Writs Act injunction requiring permission from the court for any party to file bankruptcy or any related lawsuits in other jurisdictions. In addition, the defendants raised numerous challenges related to the legal and factual sufficiency of the evidence.

IV. CONCLUSION

After reviewing the voluminous record in this case and carefully considering the parties' respective briefings, we find no error on the part of the District Court with respect to those issues not waived on appeal. Accordingly, we AFFIRM the District Court's judgment.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED AND FILED JULY 10, 2000 AND ENTERED JULY 11, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:99-CV-0628-G

STEWART RAHR and
CONTINENTAL INVESTMENT CORPORATION,

Plaintiffs,

v.

R. DALE STERRITT, JR., *et. al.*,

Defendants.

FINAL JUDGMENT

On June 12, 2000, the Court called this case to trial. Plaintiffs Stewart Rahr ("Rahr") and Continental Investment Corporation ("CIC") and Defendants R. Dale Sterritt, Jr. ("Dale Sterritt"), Richard D. Sterritt, Sr. ("Dick Sterritt"), Edward W. Roush, Jr. ("Roush"), Freddie Joe Royer, Jr. ("Royer"), Malcolm M. Kelso ("Kelso"), Larry Wayne Sterritt ("Larry Sterritt"), Richard Straza ("Richard Straza"), Robyn Ann Straza-Sterritt ("Robyn Straza-Sterritt"), Sterritt Properties, Inc. ("Sterritt Properties"), and 20th Century

Holdings, Inc. ("20th Century") appeared in person, by corporate representative, and/or through their attorneys of record and announced ready for trial. The Court determined that it had jurisdiction over the subject matter and the parties to this proceeding. The Court then impaneled and swore the jury, which heard the evidence and arguments of counsel. The Court submitted questions, definitions, and instructions. In response, the jury made findings that the Court received, filed, and entered of record.

As part of its verdict, the jury found that the following defendants engaged in conduct constituting fraud: Dale Sterritt, Dick Sterritt, Roush, Royer, Larry Sterritt, Sterritt Properties, and 20th Century. In addition to these defendants, the jury also found that the following defendants engaged in conduct constituting conspiracy to commit fraud: Malcom Kelso, Richard Straza, and Robyn Straza-Sterritt.

The jury also found that the harm experienced by CIC from the failure to comply with a fiduciary duty and/or conspiracy was the result of malice or fraud on the part of the following defendants: Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, and Sterritt Properties.

In addition, the jury found that the following defendants committed theft: Dale Sterritt, Dick Sterritt, Roush, Royer, and Kelso.

Finally, the jury found that certain defendants were responsible for the conduct of the following corporations: (1) for Kelso & Roush, Inc.: Kelso and Roush; (2) for Nikko Trading of America Corporation: Dale Sterritt, Dick Sterritt,

Roush, Royer, and Kelso; (3) for Woodland Ventures, Inc.: Dale Sterritt, Dick Sterritt, Roush, and Kelso; (4) for Swan Financial Services, Inc.: Dale Sterritt and Dick Sterritt; (5) for Atremo Holdings, Inc., S.A.: Dale Sterritt, Dick Sterritt, Roush, and Royer; and (6) for Wallenberg Financial, Inc., S.A.: Dale Sterritt, Dick Sterritt, Roush, and Royer.

The Court now renders judgment for Plaintiffs based on the jury's verdict and incorporates the jury's findings for the purposes of this judgment.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that, based on the jury's verdict and/or the default judgments previously entered against Kelso & Roush, Inc., Nikko Trading of America Corporation, Woodland Ventures, Inc., Swan Financial Services, Inc., Atremo Holdings, Inc., S.A., and Wallenberg Financial, Inc., S.A., Plaintiff Rahr's Motion for Judgment as a Matter of Law, and the evidence presented at trial, Rahr is entitled to and shall recover judgment against Defendants Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover actual damages of $12,185,712 from Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century, jointly and severally.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $50,000,000 from Dale Sterritt.

Appendix B

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $10,000,000 from Dick Sterritt.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $5,000,000 from Roush.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $5,000,000 from Royer.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $5,000,0000 from Kelso.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $5,000,000 from Larry Sterritt.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $8,000,000 from Sterritt Properties.

IN ADDITION, IT IS ORDERED, ADJUDGED, AND DECREED that, based on the jury's verdict and/or the default judgments previously entered against Kelso & Roush, Inc., Nikko Trading of America Corporation, Woodland Ventures, Inc., Swan Financial Services, Inc., Atremo Holdings, Inc., S.A., and Wallenberg Financial, Inc., S.A., and the evidence presented at trial, CIC is entitled to and shall recover judgment against Defendants Dale Sterritt, Dick

Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover actual damages of $15,646,000 from Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century, jointly and severally.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover profits wrongfully obtained in the amount of $8,000,000 and exemplary damages of $50,000,000 from Dale Sterritt.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover profits wrongfully obtained in the amount of $3,000,000 and exemplary damages of $10,000,000 from Dick Sterritt.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover profits wrongfully obtained in the amount of $1,000,000 and exemplary damages of $5,000,000 from Larry Sterritt.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover profits wrongfully obtained in the amount of $12,000,000 and exemplary damages of $8,000,000 from Sterritt Properties.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover exemplary damages of $5,000,000 from Roush.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover exemplary damages of $5,000,000 from Royer.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover exemplary damages of $5,000,000 from Kelso.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover prejudgment interest in the amount of $2,747,627.66, and post-judgment interest as provided by law, from defendants Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century, jointly and severally.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover prejudgment interest in the amount of $3,004,889.32, and post-judgment interest as provided by law, from defendants Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century, jointly and severally.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that costs of court shall be taxed against defendants Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr and CIC shall recover post-judgment

interest, at the maximum rate provided by law, on each amount of exemplary damages awarded, and costs taxed, against each defendant. In addition, the verdict of the jury as to defendants Suresh Chainani, Kanayo Wadhwani and Dresco Investments, Inc. (the "Dresco Defendants"), and Sarah Sterritt, was for the Dresco Defendants and Sarah Sterritt and against Plaintiffs. Accordingly, the Court hereby determines that judgment should be rendered on the verdict in favor of the Dresco Defendants and Sarah Sterritt and against Plaintiffs.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiffs Rahr and CIC shall take nothing by their suit against Suresh Chainani, Kanayo Wadhwani, Dresco Investments, Inc., and Sarah Sterritt.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that all costs of court incurred by Suresh Chainani, Kanayo Wadhwani, Dresco Investments, Inc., [and Sarah Sterritt] are hereby taxed against Rahr and CIC.

IT IS, FINALLY, ORDERED, ADJUDGED, AND DECREED that all further affirmative relief requested by Rahr and/or CIC against the aforementioned defendants is DENIED.

The Court ORDERS execution for this judgment.

THIS IS A FINAL JUDGMENT.

SIGNED this 10 day of July, 2000.

s/ A. Joe Fish
THE HONORABLE A. JOE FISH
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITIONS FOR REHEARING DATED AND FILED JULY 8, 2002

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-10947

STEWART RAHR, in his own right and in the right and on behalf of Continental Investment,

Plaintiff-Appellee,

VERSUS

RESCUE CAPITAL CORPORATION, ET AL.,

Defendants,

MALCOLM M. KELSO, R. DALE STERRITT, JR., EDWARD W. ROUSH, JR., FRED ROYER, RICHARD D. STERRITT, SR., LARRY STERRITT, STERRITT PROPERTIES, INC., and 20TH CENTURY HOLDINGS, INC.,

Defendants-Appellants,

VERSUS

CONTINENTAL INVESTMENT CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITIONS FOR REHEARING

Appendix C

Before DUHÉ, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIUM:

IT IS ORDERED that the petitions for rehearing are DENIED. We caution counsel for Kelso and Roush about the inappropriateness of making unfounded assertions about the basis for our original decision in this case.

ENTERED BY THE COURT:

s/ [illegible]
United States Circuit Judge